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IN THE
Supreme Court of the United States

OCTOBER TERM, 1980

ABCO BUS CO., INC.,

Petitioner,

-against-

FRANK J. MACCHIAROLA, individually and as Chancellor of the Board of Education of the City of New York, and DAVID WOLOVICK, individually, and as Director of the Bureau of Supplies of the Board of Education of the City of New York, and FLORENCE FLAST, individually and as Director of Pupil Transportation of the Board of Education of the City of New York, and THE BOARD OF EDUCATION OF THE CITY OF NEW YORK,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF NEW YORK STATE

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QUESTIONS PRESENTED FOR REVIEW ARE AS FOLLOWS

1. Did the failure of the Board of Education to uniformly enforce its policy of not allowing contracts to bidders with prior criminal records violate the Petitioner's rights of equal protection guaranteed by the Fourteenth Amendment?

2. Was the Board of Education's decision in denying the contracts to Petitioner arbitrary and capricious in that the Board never promulgated any standards or policy for the awarding of Bus contracts and therefore violated Petitioner's rights under the Fifth and Fourteenth Amendments?

3. Was the Petitioner's Eighth Amendment rights under the United States Constitution violated by the actions of the New York State Court of Appeals?

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

ABCO BUS, CO., INC., hereby petitions for a writ of certiorari to review the judgment of the Court of Appeals of New York State, which reversed a judgment of the Appellate Division of the Second Department of New York State.

OPINION BELOW

The opinion of the Court of Appeals of New York, *52 NY2d, 938 (1981)* and the opinion of the Appellate Division, 2nd Dept., *75 AD2d 833 (1980)* are attached hereto and made a part hereof as pages 1a through 6a, of the Appendix. The opinion of the Court of Appeals denying a Motion for Re-Argument, ____NY2d____ (1981), is also attached hereto and made a part hereof.

JURISDICTION

The Judgment of Reversal by the Court of Appeals of New York State was dated and entered on February 12, 1981. Jurisdiction is conferred on this Court by *28 U.S.C. 1257 (3).*

CONSTITUTIONAL AMENDMENTS INVOLVED

ARTICLE V

"No person shall . . . be deprived of . . . property without due process of law"

ARTICLE VIII

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

ARTICLE XIV

". . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

REASONS FOR GRANTING THE WRIT

The Petitioner contends that the actions of the Board of Education, and the decision of the Court of Appeals of the State of New York, violate the petitioner's rights guaranteed to it under the Fifth, Eighth and Fourteenth Amendments to the United States Constitution.

STATEMENT OF THE CASE

Abco Bus Co., Inc., (Abco) a bus contractor for the Board of Education (Board) for the past 8 years was the low bidder on three bus contracts let out for bid by the Board. The respondent Board, by letter dated June 29, 1979, advised Abco that they would not be receiving any award of contract for the transportation of pupils. An Order to Show Cause was then brought on July 3, 1979, before the Hon. Hirsch, J. This Order to Show Cause was dismissed without prejudice because the administrative remedy of appearing before the Board of Review of the Board of Education was not yet utilized. Thereafter, a hearing was held before said Board of Review of July 5, 1979. Though one month elapsed, the Board of Review rendered no written decision; though, counsel for Abco was advised orally, that the Board of Review had affirmed the Board's decision. Thereafter, another Order to Show Cause was brought; and on the same day a written decision was handed down by the Board of review.

The gravamen of the decision of the Board of Review was that the Board would not allow any contracts to Abco because of the fact that two of Abco's stockholders, Lawrence Paladino and Lorenzo Lampasi had prior criminal records. The matter was then set down for a hearing to determine whether or not the Board's action was arbitrary and capricious in denying the contracts to Abco.

Testimony was taken on August 13, 1979; before the Hon. Joseph Slavin. The Board presented two witnesses in support of their position. Their testimony was as follows:

Sheldon Rosenblum, Assistant Director of the Commercial Division of the Office of Legal Services of the Board, testified as follows:

That he was the person who issued legal opinions concerning contract interpretations, and advised the Board in policy making functions (30).* That in the fall of 1978, he was charged with the examination and drafting of the contract specifications for pupil transportation for the year 1979 (30-31). Sometime in September of 1978 the witnesses and one Ms. Flast made a determination concerning how the Board would define responsible bidder (32).

At that time, the witness stated that he explained to Ms. Flast that responsible bidder covered financial responsibility; capitalization of a firm; and *moral worth.* (italics supplied) (35). The witness stated that this interpretation was based upon a clause set forth on page 7 of the instructions to bidders entitled "Award" (36). This section will be set forth verbatim later in this brief.

The witness further testified that the policy he was discussing would be to examine the backgrounds of the bidders, for the first time as far as he knew; and to have the Department of Investigation investigate the backgrounds and records of the principals, shareholders and principal managerial personnel of all the apparent low bidders (37). The witness testified that there was a bidders conference held on December 21, 1978 (39). At that conference there were approximately 300 potential bidders and a panel of representatives from the Board of Education (40). The witness stated that the conference began with an explanation and run-through of the contract documents since it was a total redraft of what previously existed in the industry. A line-by-line analysis of the con-

* Refers to page numbers of Minutes of Record of Hearing dated August 13, 1979.

tract took place (41). In response to a question by the Court, the witness stated that a member of the panel enunciated the policy of the Board with reference to responsible bidders (42). The witness stated that the policy was as follows:

> "A. The question of the Board was merely stated through investigation as to the finances of the bidder would be made by the Board's Office of Auditor General, and that there would be a thorough background investigation made of the contractor, its principals and shareholders and anybody that the contractor revealed who had an interest in the bid as expressed on the bid certification form, there would be a thorough investigation of all these people by the Department of Investigation on behalf of the Board." *(p. 42-43).*

The witness then went on to say that there was no other statement made other than that the low bidders would be investigated by the Department of Investigation (43).

Another bidders' conference was held in the latter part of January 1979 (43). Again, in response to the Court's question the witness stated that there was no further definition or explanation of the term "responsible bidder," at the January 1979 conference (44).

The first bids were opened in February of 1979; and all the successful low bidders submitted the names of their principals and shareholders which were then referred to the Department of Investigation (45-46).

The witness then stated that the definition of "responsible bidder" was only discussed by himself, with other members of the Board (47-48). The witness then testified that this new criteria for rejecting bids was set forth after the opening of the first bids (49). A document dated March 19, 1979, entitled "Criteria for Rejecting" was submitted to the Court (48). The Board began to

receive reports from the Department of Investigation in April of 1979, and then in July of 1979 (50). These reports from the Department of Investigation revealed whether any of the low bidders had "convictions" (50). The witness then stated as follows:

> "A. Oh, those—concerning those bidders that the Investigation revealed had convictions, those companies were looked at as to whether or not the convictions were of such a nature in relation to how old the convictions were, and the type of act committed, as to whether or not it would be appropriate to proceed to a Board of Review in an effort to have these bidders declared irresponsible."

The witness stated that the determination that a crime was too old or the act was of unimportance was made at a meeting in June of 1979, attended by various members of the Board and the Department of Investigation (51). It is interesting to note that the document that the witness used to refresh his recollection as to the various companies that were reported at the June 1979 meeting was dated July 6, 1979 (52).

The witness then testified that the following individuals were reported by the Department of Investigation to the Board:

1. PHILIP "WOOT"—TERRY'S TRANSPORTATION—arrested in 1973 for harassment, resisting arrest, operating a motor vehicle without a license, leaving the scene of an accident. He plead guilty to harassment, and unlicensed operator. He got a contract from the Board (52-53).

2. TUFARO—Convicted of criminal possession of a firearm in 1956. He will also receive a contract from the Board (53).

3. DASH TRANSPORTATION—the President and sole stockholder admitted to paying bribes when employed

by the Building Department in 1973 and 1974. He has not received a contract yet, but was not automatically rejected as was Abco (53-54).

4. ABLE BUS CO.—the sole stockholder and President took the Fifth Amendment privilege before the Department of Investigation on May 3, 1977; and failed to disclose that fact in his 1979 bid application. He received a contract from the Board (54).

The only firm that did not receive a contract was Omega Transportation, whose President was convicted of first degree assault in 1973.

The witness then went on to explain the rationale used by the Board in allowing each of the above companies a contract as responsible low bidder (56-59).

The witness was then questioned about one of the corporate officers of Abco, Lorenzo Lampasi, who was convicted in 1970 of making a false application for a mortgage to the Federal Housing Administration in 1964 (60). The witness stated that such a conviction would not in and of itself disqualify a low bidder (60-61).

Cross-examination of the witness was as follows: (65)

The witness testified that the first time he received any information as to the corporate officers of Abco from the Department of Investigation was after July 6, 1979. Yet, Abco had already received a letter of disqualification from the Board on June 29, 1979, one week before any report was ever received from the Department of Investigation (65-67). The witness further stated that the clause requiring low bidders to appear before any Governmental Agency with the power of subpoena, under pain of being disqualified from the contract if they did not appear, or, if they appeared and took the Fifth Amendment, was in effect long before this new contract was drafted (71-72). Yet, Mr. Romanello, President of Able Bus Co., Inc., received a contract from the Board in 1979, though he took the Fifth Amendment before the Department of In-

vestigation on May 3, 1977, and failed to disclose that fact in his 1979 bid application (73-75).

The witness then testified that after receiving the reports from the Department of Investigation in July of 1979, that a *concensus* was reached of the individuals present at the meeting referred to at page 51 of the record as to whether or not to allow a contract or disallow a contract to the firms named by the Department of Investigation (77). The witness then stated that in fact, it was Mr. Savitz, the Senior Assistant to the Chancellor for Business, who made the ultimate decision as to whether or not to allow the contract (78).

The witness then stated that at the time the new contract was promulgated and discussed at the two meetings held with potential bidders in December of 1978 and January of 1979, that the Board did not notify any of the contracting parties that the possession of a criminal record by a stockholder of a low bidding corporation would be grounds for disqualification (79). The witness further stated that there were no procedures or promulgations for a corporation with a stockholder with a criminal record to divest himself of the stock in the corporation to comply with the new moral procedure of the Board (79). The witness merely stated that Ms. Flast said that at Board meetings that the bids would be held to "the highest moral standards" (80).

The Court then asked the witness: (81) "What do highest moral standards mean? Is there any definition of what it means?" The witness answered as follows:

> "As it developed it meant that, as it came to be, that convictions of a certain type would not be tolerated." (81)

The witness then stated that this notification was sent to the bidders *after* the bidding took place (81).

The witness stated that the standard used was:

"It was a consideration of looking at a company, seeing the totality of the individuals, the principals and stockholders, seeing the nature and the frequency of the offenses." (82)

A further analysis of what the standard of the Board was then developed (82-84).

The witness then acknowledged that the eight years of prior unblemished service to the Board of Abco was not discussed at the July 6, 1979 meeting (84-85). The witness acknowledged that the fact that Abco was requested by the Board to pick up additional runs of defaulting contractors, and did so, was not discussed at the meeting of July 6, 1979 (87-89).

Finally, the witness stated that the criteria for disqualification was "recommendation of D.O.I. based on evidence of criminality of principals in the company" (90). The witness stated that his interpretation of "criminality" meant convictions (90-91).

The next witness called by the Board was Detective William Poulos, of the Department of Investigation Squad who testified as follows (91):

That he conducted an investigation with regard to Abco (94). That he had knowledge that the two principals of Abco, Lampasi and Paladino, were interviewed by the Department of Investigation (94). The prior criminal records of Mr. Paladino and Mr. Lampasi were already part of the Court record.

DEFINITION OF AWARD

"The award of Contract, if made, will be made according to law, as soon after the opening of bids as practicable, by item, to the lowest responsible bidder offering the lowest weighted average daily rate per vehicle for extended and regular service as specified in each item." (*p. 7 of Contract*).

The investigation of the Department of Investigation revealed that Paladino had pleaded guilty to conspiracy to obstruct commerce by extortion and income tax evasion. His five year sentence of probation was revoked in June of 1978, for having associated with persons having criminal records. Lampasi was found to have been convicted in 1970 of obtaining an F.H.A. loan in 1964 and using the funds for a purpose other than stated on the loan application.

After the hearing, Abco was awarded a contract. The decision of Judge Joseph Slavin (100 Misc. 2d 712) Sup. Ct. Kings (1979) is reproduced as appendix "A." This decision was affirmed by the Appellate Division, *75 AD2d, 833 (1980).* The Court of Appeals reversed the Appellate Division, *52 NY2d 938 (1981).* The Court of Appeals denied a Motion for Re-Argument, ____NY2d,____ *(1981).*

POINT ONE

THE BOARD HAS FAILED TO SHOW UNIFORMITY OF ENFORCEMENT OF THE INTERNAL POLICY OF NOT ALLOWING CONTRACTS TO BIDDERS WITH PRIOR CRIMINAL RECORDS

Mr. Rosenblum testified that the determination as to whether or not a low bidder would receive a contract would be based upon the report of the Department of Investigation, and a conference held at the Board of Education among various individuals who form the "policy" of the Board. He stated that the determining factors in disallowing a contract to a low bidder would be: (a) if a principal of the contractor had a criminal *conviction*; (b) if there was a conviction, the criteria used would be the *type of crime* and the *age* of the conviction (82). Testimony

and documentary evidence revealed that the following corporations were allowed contracts by the Board:

1) ABLE BUS CO., INC.—Michael Romenelli, President and sole stockholder took the Fifth Amendment privilege on May 3, 1977, in front of the Department of Investigation; and failed to disclose that fact in his 1979 bid application.*

2) DASH TRANSPORTATION CO.—Charles Rizzo, President and sole stockholder admitted to paying bribes when employed by the Buildings Department in 1973 and 1974. The criminal prosecution of Mr. Rizzo was time-barred by the Statute of Limitations.

3) CHIEF TRANSPORTATION INC.—Michael Mangino, President and sole stockholder was discharged from the Police Department for accepting bribes in 1956. Mr. Mangino was also discharged from his position as chief dispatcher with Varsity Transit Co., in 1975 for adding private school stops to his school bus route for the payment of money.

4) TERRY'S TRANSPORTATION CO. INC.,—Philip Wu, sole proprietor was allowed a contract because the Board was unable to determine which charge Mr. Wu had pled guilty to.

5) TUFARO TRANSPORTATION CO.—Joseph Tufalo, President and holder of fifty-one (51%) percent of stock, was convicted of criminal possession of a firearm in 1956.

Clearly, the pattern of convictions, departmental violations and administrative proceedings show that the Board exercised no uniformity of enforcement with reference to the prior violations and convictions of contractors. Mr. Rosenblum was unable to state to the Court

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* In *Mtr. of Dairymen's League v. Perrini, 54 Misc. 2d 400 (1967)* the taking of the Fifth Amendment was considered grounds for refusal to let a contract to the lowest bidder.

any standard of criteria which the Board used to disqualify ABCO; and, to determine that the companies above set forth were of the "highest moral standards." Instead, the record shows, that the Board used a helter-skelter approach without any evidentiary or reasonable criteria to guide it.

Furthermore, the Board did not take into consideration the fact of Abco's 8 years of prior unblemished service to the Board. Nor, did the Board take into consideration the fact that even when the Board was considering denying Abco its contracts; it came to Abco in June of 1979, on an emergency basis, to "pick up" bus runs of companies that had defaulted (88).

It is petitioner's contention that the above described treatment is unequal and a violation of petitioner's rights.

Recently, the Supreme Court of the United States in *New York City Transit Authority v. Beazer,* 440 US 568, 99 S. Ct. 1355 (1979) restated a very basic premise:

> "The Equal Protection Clause of the Fourteenth Amendment provides that no State shall 'deny to any person within its jurisdiction the equal protection of the law.' The Clause announces a fundamental principle: the State must govern impartially. General rules that apply evenhandedly to all persons within the jurisdiction unquestionably comply with this principle. Only when a governmental unit adopts a rule that has a special impact on less than all the persons subject to its jurisdiction does the question whether this principle is violated arise." (*Id. at page 587)*

The petitioner, having been a successful low bidder, was entitled to a binding contract from the Board. The Board contends that they can do business with anyone they like for any reason whatsoever. By denying petitioner his contractual rights, while allowing others with more questionable backgrounds to work, the Board has not followed its own internal policies. By upholding the

Board's determination, and in reversing the Appellate Division, the Court of Appeals of New York State's result is akin to the result described in *In re: Carter, 177 F.2d 75, 85 United States Court of Appeals, D.C. 229, cert. denied, 338 U.S. 900 (1949),* wherein the Court stated:

> "The error in the foregoing reasoning is that it ignores the key and controlling fact in the situation. The application had been granted. Carter had an authorization. He was engaged in business. The action of the court was not to deny him something he was seeking; it was to deprive him of something which he had. . . . The same is true in respect of licenses to do business in many forms. Prior to grant, many processes are available for inquiry and information. But, once granted, the license becomes a right, and due process of law must be followed to achieve deprivation." *(Id. at page 78).*

The actions of the Board of Education, as upheld by the Court of Appeals of New York State, has deprived petitioner of his rights under the Fifth and Fourteenth Amendments of the Constitution. Specifically,

> "The right to pursue a lawful business including the solicitation of customers necessary to the conduct of such business has long been recognized as a property right within the protection of the Fifth and Fourteenth Amendments of the Constitution (Louis K. Ligget Co. v. Baldridge, 278 U.S. 105, 49 S. Ct. 57, 73 L.Ed. 204 (1928); cf., Duplex Printing Press Co. v. Deering, 254 U.S. 443, 465, 41 S. Ct. 172, 65 L.Ed. 349 (1921); Small v. United States, 333 F.2d 702 (3d Cir. 1964); Pierce Ford Sales, Inc. v. Ford Motor Co., 299 F.2d 425 (2d Cir. 1962), cert. denied, 371 U.S. 829, 83 S. Ct. 24, L.Ed. 2d 66 (1962). *U.S. v. Tropiano, C.A. Conn., 418 F.2d 1069, cert. denied, 90 S. Ct. 1258 (1969). Id. at page 1076*

It is not sufficient that the Respondent Board makes regulations which, on its face, appear to be uniform in its application.

It is clear from the facts of the instant case that the Board did not treat all applicants equally. As was stated in *U.S. v. Thorn, D.C., La., 317 F. Supp. 289 (1970):*

> "Equal protection, as implied in the due process clause of the Fifth Amendment 'requires only that all legislative classifications have a reasonable basis and that everyone placed within a classification be treated similarly.' United States v. Holmes, supra, 387 F.2d at 785; cr. United States v. Fallon, 407 F.2d 621, 623 (7th Cir. 1969)." *Id. at page 394.*

See also *Government of the Canal Zone v. Brooks,* 427 F.2d 346 (1970):

> "It is equally well established that it is a denial of due process for any government agency to fail to follow its own regulations providing for procedural safeguards to persons involved in adjudicative processes before it. Vitarelli v.Seaton, 359 U.S. 535, 79 S. Ct. 968, 3 L.Ed.2d 1012 (1959); Service v. Dulles, 354 U.S. 363, 77 S.Ct. 1152, 1 L.Ed. 2d 1403 (1957); United States ex rel. Accardi v. Shaughnessy, 347 U.S. 260, 74 S.Ct. 499, 98 L.Ed. 681 (1954)." *Id. at page 347.*

As the New York Court of Appeals held in *300 Gramatan v. Human Rights, 45 N.Y.2d 176 (1978):*

> "Whether an administrative agency determination is shored up by substantial evidence is a question of law to be decided by the Courts, . . . , it having been stated with some frequency that insufficient evidence is, in the eyes of the law, no evidence." *Id. at p. 181.*

The Court of Appeals of New York goes on to say:

"A Court reviewing the substantiality of the evidence upon which an administrative agency has acted exercises a genuine judicial function and does not confirm a determination simply because it was made by such an agency (Matter of McCormack v. National Citv Bank, 303 N.Y. 5, 8-9). In final analysis, substantial evidence consists of proof within the whole record of such quality and quantity as to generate conviction in and persuade a fair and detached fact finder that, from the proof as a premise, a conclusion or ultimate fact may be extracted reasonable—probatively and logically (cf. Matter of DiNardo v. Monaghan, 282 App. Div. 5, 7, supra, Matter of Thomas v. Codd, 51 A.D. 2d 418, 420; Matter of Phinn v. Kross, 8 A.D.2d 132; 137; 34 Carmody-Wait 2d, Proceeding Against Body or Officer, §143: 350). Put a bit differently, 'the reviewing court should review the whole record to determine whether there is a rational basis in it for the findings of fact supporting the agency's decision' (McCormick Evidence (2d ed), §352, p. 847; see Matter of Pell v. Board of Educ., 34 N.Y.2d 222, 231; Siegel, New York Practice (1978), §560, p. 783." *Id. at p. 181-182.*

It is respectfully submitted that the lack of uniform enforcement of the purported policy of the Board, as shown by this record is in and of itself a denial of petitioner's Constitutional Rights.

POINT TWO

THE BOARD'S DECISION IN DENYING THE CONTRACTS TO ABCO WAS ARBITRARY AND CAPRICIOUS IN THAT THE BOARD NEVER PROMULGATED ANY STANDARDS OR POLICY FOR THE AWARDING OF BUS CONTRACTS

It is the position of Abco herein that the affirmance by the Appellate Division of the Order of Mr. Justice SLAVIN was eminently correct. Clearly, the record in the case at bar shows not one scintilla of evidence that the "new contract" in any way, changed the standards of "responsible bidder" as had been used in the past 8 years that Abco had been servicing the Board of Education.

The fact that administrative agencies have broad latitude in disqualifying a prospective contractor for failure to be a responsible bidder is Hornbook Law. But, even the respondent must admit that the decision must be *"bottomed on substantial factual support and the method chosen is reasonable."*

A case remarkably similar to the case at bar is that of *Gonzales v. Freeman,* 334 F.2d 570 (USCA D.C. Cric. 1964), in which Judge Burger, (now Chief Justice of the United States Supreme Court) held as follows:

> "The command of the Administrative Procedure Act is not a mere formality. Those who are called upon by the government for a countless variety of goods and services are entitled to have notice of the standards and procedures which regulate these relationships. Neither appellants nor others similarly situated can turn to any official source for guidance as to what acts will precipitate a complaint of misconduct, how charges will be made, met or refuted, and

what consequences will flow from misconduct if found. *** On this record there is neither the appearance nor the reality of fairness in the process by which debarment of appellants was accomplished. *** Such debarment cannot be left to administrative improvisation on a case-by-case basis. The governmental power must be exercised in accordance with accepted basic legal norms." *Id. at p. 578.*

In its brief submitted to the Court of Appeals, respondent cites many cases which are clearly distinguishable from the instant case.

In citing the leading case of *Matter of Caristo Constr. Corp. v Rubin,* 15 A.D.2d 561 (2d Dept. 1961), aff'd 10 N.Y. 2d 538 (1962), the respondent misses the entire thrust of the opinion. An examination of *Caristo, supra,* at the lower level in *30 Misc. 2d 185 (1961),* shows that Caristo Construction Corp. and another contractor entered into a collusive agreement for Caristo to "buy" his way out of a tie bid, which was *the very bid that was under consideration* by the Board of Education. The substantial factual basis enunciated by the Appellate Division in *Caristo, supra,* was that it was proven that Caristo entered into an agreement with another contractor in bidding for public work which tended to suppress or stifle competition and was against public policy and void. In fact, Caristo had made a "deal" to obtain the contract; and, it was clearly proven, that this "deal" was illegal.

Again, respondent's reliance on *Matter of Meyer v. Board of Educ.,* 31 Misc. 2d 407 (1961), is misplaced. Meyer, was denied his bid because he submitted two people as references, and upon interview these people supplied information which failed to show that the petitioner was a responsible person. (*Id., at p. 408).*

In the case of *Picone v. City of New York,* 176 Misc. 967 (1941), the question or moral worth was discussed. The construction company which was the low bidder was proven to be a "front" for one Vito Picone,

"whose activities in connection with public construction contracts over a period of years had brought them into frequent conflict with the criminal law and its enforcement agencies." *Id., at p. 969.*

An examination of *Delwood Foods v. Board of Education,* 97 Misc. 2d 751 (1978), showed that Delwood, though low bidder, was refused a milk contract for the reasons that it had breached material contract provisions. These breaches consisted of delivering frozen and sour milk; containers of milk covered with dirt and debris; and delivering milk long past the lunch hour to the schools to be serviced (*Id. at p. 752-753).*

In each of the above cases, it is clear that the Court is discussing cases in which the company that was refused the low bid had acted illegally, immorally or inefficiently with regard to the contract for which it bid; or, for the contract in which it previously serviced the municipality.

In light of Abco's conceded exemplary performance with the Board for the past 8 years, it is clear that the officers of Abco are being penalized for what they were, and not what they are or what their company did for the Board. An examination of *Mtr. of Diocese of Rochester v. Plan. Bd. 1 N.Y.2d 508,* clearly shows that reliance on said case is misplaced. *Matter of Diocese, supra,* stands for the following proposition of law:

> "It is well settled that a court may not substitute its judgment for that of the board or body it reviews unless the decision under review is arbitrary and unreasonable and constitutes an abuse of discretion. *(People ex rel. Hudson-Harlem Co. v. Walker, 282 N.Y. 400); Matter of Levy v. Board of Standards & Appeals, 267 N.Y. 347).*" *Id. at p. 520.*

It is clear, that the testimony of Mr. Rosenblum, and all of the documents admitted into evidence show that the

Board never promulgated the standards and policy of the Board to the potential contractors. In fact, the standards used by the Board were used on such an *ad hoc* basis, as to allow no one to have any idea as to what the standards of the Board were. For this reason alone, it is submitted that the Board's decision as to Abco was arbitrary and capricious. In *Volpe v. City of New York,* 178 Misc. 243 32 N.Y.S.2d 828 (1941), the Court defined the word arbitrary as follows:

> "The word 'arbitrary' is defined as 'depending on will or discretion *** arrived at *** by caprice—without consideration *** decisive but unreasoned *** despotic' (Webster's New International Dictionary, Second Edition); and again as 'without adequate determining principle *** non rational *** capricious' (Funk & Wagnall's new Standard Dictionary). See also Rathbone v. Wirth, 150 N.Y. 459, 45 N.E. 15, 34 L.R.A. 408; Bareham v. City of ROchester, 221 App. Div. 36, 222 N.Y.S. 141." *Id. at p. 247.*

In the case of *Matter of Pell v. Board of Education,* 34 N.Y.2d 222, 346 N.Y.S.2d 883 (1974), the Court of Appeals held that in an Article 78 proceeding it can review whether the agency acted: (1) in an arbitrary, capricious, unreasonable manner; (2) inconsistent with law; (3) without rational basis, or (4) whether substantial recorded evidence exists to support the agency determination. *Id. at p. 231.*

In the *Matter of Armere Corp. v Bell,* 44 A.D.2d 578 353 N.Y.2d 245 (1974), rev'd on other grounds, 37 N.Y.2d 925 (1975), the Appellate Division, Second Department held that:

> "Even a purely administrative determination may not stand untested in the face of charges of arbitrary and capricious action. (CPLR 7803 subd. 3)," *Id. at p. 578.*

In the *Matter of Duncan v. Savino,* 90 Misc. 2d 282, 394 N.Y.S.2d 362 (1977), the Court held as follows:

> "The rules and regulations promulgated by the respondent—School District are clearly subject to review by this Court. CPLR §7801, §7803. The Court may determine whether the provisions of the regulations are in violation of lawful procedure, arbitrary, an abuse of discretion or an error of law. CPLR §7803". *Id. at p. 284.*

Clearly, in the case at bar no rules, regulations or standards were articulated or promulgated to the prospective contractors. Nowhere were the contractors advised that prior criminal records of principals would be a bar to a contract award from the Board. At no time were the contractors given a reasonable time to divest any stockholders with criminal records of their stock in the corporation. At no time were the potential contractors advised as to what crimes would be deemed serious, deemed time-barred even if serious; or deemed not serious.

It is clear that the only "standards" of the Board were those that were devolved internally, and in no way made public. It is respectfully submitted that such action was arbitrary and capricious.

As was stated by the Appellate Division below:

> "The board, by its February 22, 1979 invitation for bids, required that the bidder be responsible. Abco, having satisfactorily served the board since 1971, had every right to assume that it was responsible and that its effort in making the bid would not be for naught. Nowhere did the board indicate that a bid would be rejected because a principal of the bidder had a criminal record. For this reason we cannot countenance the application of the standard which the board seeks to impose on Abco. We are fortified in this view by the long satisfactory service Abco rendered the board, and by the fact that the crimes with which Ab-

co's principals were charged are not of a type which make it clear that Abco is unable to responsibly or safely transport school children. *Id. at page 832.*

Finally, any doubts as to the arbitrariness of the board's action is obviated by its acceptance of bids from other corporations whose principals have records of criminal activities. *Abco Bus Co., Inc. v. Frank J. Macchiarola, individually and as Chancellor of the Board of Education of the City of New York, et. al. (Id. at 833).*

The Board's actions are not justified in that the evidence did not indicate any reason why petitioner was singled out. As was stated in *Cunningham v. United States, Ca. La.*, 256 F.2d 467 (1958).

"While arbitrary or unreasonable classifications may not be set up, there must be differences in character, condition or situation to justify the distinction; that the distinctions and differences in short must bear a due and proper relation to the classification; the equal protection of the laws is afforded if the law in question operates in the same general way on all who belong in the same class. *Id. at p. 473.*

POINT THREE

THE PETITIONER'S EIGHTH AMENDMENT RIGHT UNDER THE CONSTITUTION WAS VIOLATED BY THE ACTIONS OF THE NEW YORK COURT OF APPEALS

In passing, it should not go unnoticed that our courts have held in numerous proceedings, wherein public employees were disciplined for offenses committed while public employees, that the Court had the power to review the sanction and consider whether it was so disproportionate to the offenses in view of all the circumstances and after a review of the whole record. *Matter of McDermott v. Murphy,* 15 A.D.2d 479 (1961), aff'd. 12 N.Y.2d 780

(1962). The Courts of this State have never failed to reduce a penalty it deemed excessive. *Matthauer v. Patterson,* 8 N.Y.2d 37 (1960).

It seems to this writer that this Court would not have to stretch its thinking in determining what the Board is attempting to do here, being the equivalent of a punishment of dismissal. Though the petitioner herein has no tenure, it does have a record of unblemished and faithful service to the handicapped students of the City of New York, and to the respondent Board. It is respectfully submitted that the "dismissal" of Abco is too harsh a penalty considering its superior past record of service. *Yancey v. NYC Housing Authority,* 33 N.Y.2d 759 (1973); *Matter of Rubenstein v. Murphy,* 43 A.D.2d 930 (1974); *Matter of McDowell v. Frank,* 43 A.D.2d 981 (1974).

An opinion of the State Tax Commissioner is almost exactly in point to the case at bar. It is set forth because of the similarity in facts to the issues herein presented.

> "Corporation may not properly be denied license as wholesale cigarette dealer based upon prior criminal record of corporation's president and sole shareholder because record of criminal convictions most recent of which is more than 12 years old, does not constitute evidence of present unfitness of applicant to hold, in corporate form, license be held without violation as individual for 8 years; refusal to grant license for cause must be based on good cause, grounds which may be properly considered under statute, and must be supported by evidence. *Re Big V Vending Corp., 1979 Op. St. Tax Comm. March 15, 1979.*"

Again, the rationale in *Gonzalez v. Freeman, supra.,* applies to the case at bar.

> "Considerations of basic fairness require administrative regulations establishing standards for debarment and procedures which will include notice of specific charges, op-

portunity to present evidence and to cross-examine adverse witnesses, all culminating in administrative findings and conclusions based upon the record so made." *Id. at p. 578.*

It is respectfully submitted that the Appellate Division below, after an examination of the Trial Record correctly enunciated the applicable principles of law as follows:

"A trial was held, the record of which shows that 1979 was the first year in which the board had instructed the Department of Investigation to investigate the backgrounds of successful bidders and that in June, 1979 the board established an internal policy that it would be reasonable to deem a corporate bidder "irresponsible" if any of its principals had a criminal record. More significantly, the evidence adduced showed that other bidders were awarded transportation contracts although their principals also had criminal records.

Based on the foregoing, we conclude that the board acted arbitrarily and capriciously in refusing to award a contract to Abco." *Abco Bus Co., Inc., v. Frank J. Macchiarola, individually and as Chancellor of the Board of Education of the City of New York, et. al., supra at p. 832.*

As Mr. Justice Stewart, concurring in *Furman v. Georgia,* 408 U.S. 304 (1972) stated:

"These . . . sentences are cruel and unusual in the same way that being struck by lightening is cruel and unusual." *Id. at p. 309.*

It is respectfully submitted that Abco was struck by lightening by the actions of the Board.

CONCLUSION

FOR THE ABOVE REASONS, A WRIT OF CERTIORARI SHOULD BE ISSUED TO REVIEW THE JUDGMENT ORDER AND DECISION OF THE COURT OF APPEALS OF NEW YORK STATE.

Respectfully submitted,

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APPENDIX "A"
OPINION OF THE COURT

JOSEPH SLAVIN, J.

The petitioner (hereafter ABCO) in this article 78 proceeding seeks to annul the determination of the respondents' (hereafter Board) cancellation of a previously awarded bus contract. ABCO was one of a group of successful low bidders on various transportation of handicapped pupils' contracts for which the Board had requested bids. Involved in this proceeding are the three specific routes identified by specific serial number in the moving papers.

ABCO has been a responsible contractor for eight years, transporting children under similar existing (and renewed each year without any major change except for the cost factors) contracts. Other than routine disallowance of certain claims, on routine audits, the Board had no complaints as to the manner in which these contracts have been complied with. For all these years, ABCO's three stockholders have been the same people.

After the advent of the new city administration and the appointment of the new chancellor, the Board decided to recast the contracts and to put them out for new public bidding.

A "new" contract was prepared by the Board. Copies were circulated among the industry and public interest groups. Two so-called conferences for bidders were held, one in December, 1978 and another in January, 1979. It appears that some 300 people attended the first conference, where the proposed form of contract was discussed in what the Board's witness categorized it to be, a detailed way. The January meeting seems to have been perfunctory.

Based on the credible testimony before me, I find that at neither meeting was there any indication by the Board

of the purpose for the requirement that each successful bidder must subject himself (or if a corporation, then the corporate stockholders and/or directors) to an investigation by the city Department of Investigation (D.O.I.). Also, and to move to the heart of the matter, neither was there any discussion of any sort of the paragraph headed AWARD, which reads: "The award of Contract, if made, will be made according to law, as soon after the opening of bids as practicable, by item, to the lowest *re-ponsible bidder* offering the lowest weighted average daily rate per vehicle for extended and regular service as specified in each item" (emphasis supplied; typographical error so in original; respondent's Exhibit A).

Based upon the Board's contention that they, in effect, can interpret the two magic words "responsible bidder" as they see fit (without any reference to any guidelines), they determined that ABCO was not a responsible bidder. This determination (initially made by the Board and sustained by their own Board of Review) was allegedly based on the fact that two of the three stockholders have criminal records. One of these two, Lorenzo Lampasi, owns 50% interest; the other, Lawrence Paladino, 25%. The third stockholder holds the other 25% interest.

As already indicated, there are no promulgated standards or policies of the Board for the awarding of bus contracts as applied to the use of the words "responsible bidder" as a basis for disqualifying a successful low bidder. The issue before me is whether the Board may interpret the words as it sees fit and secondarily, as claimed by the petitioner, even the interpretation used by the Board has nto been uniformly enforced.

On trial, it was the Board's position that they "require the highest moral standards to be exhibited by the contractors and evidence of prior criminal behavior is suf-

ficient to disqualify a contractor who seeks to be entrusted with the custody and care of the children of our community." While generally one might tend not to quarrel with this position, it could present problems with the view that persons convicted of a crime can be rehabilitated and that the stigma of the conviction should not follow them forever so as to prevent their total return to productive society. However, the Board never publicly made any definitive public statement about the moral standards they were adopting.

Despite the holding of conferences by the Board for potential bidders and the public at large, no rules, regulations or standards were articulated or promulgated to or for the prospective contractors. Nowhere were the contractors advised that pror criminal records of principals would be a bar to a contract award from the Board. At no time were the contractors given a reasonable time to divest any stockholders with criminal records of their stock in the corporation, nor were the potential contractors advised as to what crimes would be deemed serious, deemed so remote as not to be considered or deemed not serious enough to be a basis for disqualification.

It is clear that the only "standards" of the Board were those that were devolved internally, and which in no way were made public.

Even these internal standards were not articulated (other than in the internal conferences among the staff members of the Bureau of Pupil Transportation and its support staff from the Offices of Legal Services and the Commercial Division) until a memo dated March 19, 1979 from Florence Flost, the Director of Transportation to a Dr. Richard Halverson entitled "Criteria for Rejecting Bids for School Bus Contracts." The preamble to that memo (respondent's Exhibit H) states that at a staff meeting held a few days earlier that "The following were

agreed upon as our recommendations."

The memo insofar as it applies to this proceeding reads:

"II. *After opening bids,* criteria upon which the Board of Review determination would be sought for the Purpose of Rejecting Bids. ***

"F. Recommendations of D.O.I., based on evidence of criminality of principals in the company.

"Notes: 1) There must be consistency in application of criteria for disqualification of bidders."

ABCO, as stated above, was a low bidder. Its stockholders subjected themselves to the required interview by the D.O.I. The D.O.I. made no recommendations. They did report on the criminal background of the two stockholders.

As to Mr. Lampasi, his conviction was to filing a fraudulent F.H.A. application in 1964. The Board's witness before me conceded that it was not the kind of crime which would lead one to believe that we could not entrust our children's care to a bus company in which he was a principal.

In fact, the credible evidence before me showed that despite investigations by the Board which resulted in findings that the principals of other low bidders had criminal records which could be called serious, contracts were awarded to them. Contracts were awarded to companies where the person or stockholder either asserted his Fifth Amendment rights and refused to answer questions (cf. section of contract headed "Investigations" which authorizes a five-year disqualification for failure to answer); actively participated in bribing city officials; accepting, while a police officer, a bribe; harassment, resisting arrest, operating a motor vehicle without a license and leaving the scene of an accident; and possession of a firearm.

These companies have active members who have evidenced past conduct which could have a bearing on the safe transportation of children, as distinguished from the Lampasi crime.

Clearly, the pattern of prior criminal involvements by other contractors shows that the Board exercised little uniformity of enforcement with reference to their prior records. The Board was unable to illustrate to the court any standard of criteria which it used to disqualify ABCO, and to determine that the companies set forth above were of the "highest moral standards." Instead, the record shows that the Board used a helter-skelter approach without any evidentiary or reasonable criteria to guide it. As the witness put it, each bidder would have to do his own legal research to determine the possible meanings and interpretations of the operable words.

This court has the authority to review in this proceeding the acts of an agency which acted in an arbitrary, capricious or unreasonable manner (*Matter of Pell v. Board of Educ.*, 34 NY2d 222).

Therefore, from all the credible evidence before me, I find that the Board has acted, insofar as ABCO is concerned, in an arbitrary, capricious and unreasonable manner and the application is granted subject to the following provisions. The ABCO entity should not be punished merely because one of its principals may be disqualified from being a part of the corporation.

This court also has the power to consider the requirements of public policy and to protect the welfare of thsoe members of our society who most require the protection of this court. In providing for the care and welfare of handicapped chidlren, the criminal backgrounds of those who seek to transport them may be considered rationally. The basic policy of the Board—if it is properly spelled out, so that prospective bidders can make an intelligent decision as to bid or not and be given a reasonable and fair op-

portunity to have a contract awarded—is sound. With the foregoing in mind, we turn to Mr. Paladino. His background of conviction for extortion and a revocation of probation for associating with persons having criminal records, in violation of the terms of his probation, is one which in the eyes of the court would provide a valid basis for the Board to consider in denying a contract. Therefore, the order and judgment herein annulling the Board's determination shall provide that ABCO Bus Co., Inc., is to retain the contracts on which it successfully bid provided that Lawrence Paladino, within six months from the date thereof in good faith sell his stock to the other stockholders or to other persons unconnected by ties of blood or marriage to him and that he, in the interim, desist from directly or indirectly participating in the business affairs of ABCO Bus Co., Inc. The corporation shall so certify, in writing, under oath, and permit the Board to inspect the transfer documents. If an outside purchaser is involved, that person shall submit himself to the D.O.I. interview as if he were an owner at the bid stage. Upon failure to comply with this direction, the Board may terminate the contract.

APPENDIX "B"
MEMORANDUM

ABCO BUS CO., INC., Respondent, v. FRANK J. MACCHIAROLA, Individually and as Chancellor of the Board of Education of the City of New York, et al., Appellants — In a proceeding pursuant to CPLR article 78 to compel the Board of Education of the City of New York (board) to award petitioner, Abco Bus Co., Inc. (Abco), a transportation contract, the appeal is from a judgment of the Supreme Court, Kings County, entered September 7, 1979, which awarded Abco the contract on condition that one of its shareholders, Lawrence Paladino, divest himself of his interest in the corporation. Judgment affirmed, without costs or disbursements. Abco was formed in 1971. It had a total of three shareholders: Lorenzo Lampazi, who owned 50% of its shares, and Lawrence Paladino and Jacqueline Greenberg, each of whom owned 25% of the shares. Since 1971 Abco had been satisfactorily transporting handicapped children for the board of education pursuant to a contract that had an expiration date in June, 1979. Prior thereto the board invited bids for the transportation of handicapped pupils for the period of September, *inter alia,* stated the following: "The award of Contract, if made, will be made according to law, as soon after the opening of bids as practicable, by item, to the lowest *responsible* bidder offering the lowest weighted average daily rate per vehicle for extended and regular service as specified in each item." (Emphasis supplied.) Abco submitted a bid pursuant to the proposal which turned out to be a successful low bid on the routes in issue. The board then had the New York City Department of Investigation do a background check on the principals of Abco. On May 9, 1979 the Department of Investigation conducted a hear-

ed guilty to a charge of possession of stolen property and was fined $250; that in 1976 he was convicted of income tax evasion and conspiracy involving the use of extortion to obstruct interstate commerce; and that in 1978 he violated his probation by associating with individuals having criminal records. Subsequent to the completion of the investigation the board informed Abco, first orally and then by letter dated June 29, 1979, that it would not "be receiving an Award of Contract." Abco sought and received administrative review of the denial. Moreover, Abco offered to have Paladino divest himself of his interest in the company if that would enable it to be awarded the contract.*

Nevertheless, the board adhered to its position stating that principals of Abco have records of criminal convictions and that disqualification of bidders with such problems is being uniformly applied. Thereupon, in August, 1979, Abco commenced this proceeding asserting that the ing as a result of which it was established that only Lampazi was involved in the day to day operations of Abco; that he had been convicted in 1970 of falsifying information on a 1964 application for a Federal Housing Administration loan (he used the loan proceeds to pay doctor bills arising from his wife's pregnancy rather than for the stated purpose of modernizing his home); and that in 1975 he had been arrested and charged with the offense of driving while intoxicated which was disposed of by a conditional discharge and a $100 fine. As to Paladino, the Department of Investigation learned that in 1971 he plead-

* We note that Abco has not cross-appealed from the judgment under review nor is Paladino a party to this proceeding. Therefore we have not addressed ourselves to whether Special Term erred in conditioning the award of the contract to Abco on Paladino's divesting himself of his interest in the firm.

board was acting arbitrarily and capriciously in refusing to award it a contract. A trial was held, the record of which shows that 1979 was the first year in which the board had instructed the Department of Investigation to investigate the backgrounds of successful bidders and that in June, 1979 the board established an internal policy that it would be reasonable to deem a corporate bidder "irresponsible" if any of its principals had a criminal record. More significantly, the evidence adduced showed that other bidders were awarded transportation contracts although their principals also had criminal records. Based on the foregoing, we conclude that the board acted arbitrarily and capriciously in refusing to award a contract to Abco. It is clear that a board of education has the authority and duty to award contracts for the transportation of school children to the lowest responsible bidder in accordance with the best interests of the school district involved (cf. Education Law, §305, subd. 14, par a; General Municipal Law, §103, subd. 1). We of course agree with the board that in determining whether a low bidder is responsible, moral character, including prior criminal activities, depending on their nature, is a valid criterion (see *Matter of Dellwood Foods v. Board of Educ.*, 97 Misc. 2d 751; *Matter of Limitone v. Galgano*, 21 Misc. 2d 376). In *Varsity Tr. v. Saporita* (71 AD2d 643, affd 48 NY2d 767) we recognized the wide authority vested in the board to make contract proposals that are required by the public interest. However, fundamental fairness requires that once such proposals are drawn and bid on, the board abide by its proposals and treat bidders uniformly. The board, by its February 22, 1979 invitation for bids, required that the bidder be responsible. Abco, having satisfactorily served the board since 1971, had every right to assume that it was responsible and that its effort in making the bid would not be for naught. Nowhere did the board indicate that a bid

would be rejected because a principal of the bidder had a criminal record. For this reason we cannot countenance the application of the standard which the board seeks to impose on Abco. We are fortified in this view by the long satisfactory service Abco rendered the board, and by the fact that the crimes with which Abco's principals were charged are not of a type which make it clear that Abco is unable to responsibly or safely transport school children. Finally, any doubt as to the arbitrariness of the board's action is obviated by its acceptance of bids from other corporations whose principals have records of criminal activities. Accordingly, we affirm the judgment appealed from. Damiani, Titone and Martuscello, JJ., concur.

Hopkins, J.P., dissents and votes to reverse the judgment and to dismiss the proceeding on the merits, with the following memorandum: A municipal contract subject to the requirements of public bidding must be awarded to the lowest responsible bidder (General Municipal Law, §103). In determining the lowest bidder, the municipal agency charged with the function is rightfully concerned with the bidder's responsibility—an elastic word which includes considerations of skill, judgment and integrity. Hence, the background of the bidder may be properly investigated by the municipal agency (*Matter of Futia Co. v. Office of Gen. Servs. of State of N.Y.*, 39 A.D.2d 136). Unquestionably, the board of education, in determining the petitioner's responsibility, was entitled to take into account the criminal record of its principals (see *Matter of Zara Contr. Co. v. Cohen*, 23 AD2d 718; cf. State Finance Law, §139-b; General Municipal Law, §103-b). Hence the board of education, upon finding that two of the

stockholders of petitioner, owning between them 75%* of the corporate stock, had criminal records, could rationally determine that the petitioner was not the lowest "responsible" bidder. Once a rational basis for that determination is found to exist, the court's power to interfere in the award of a contract arising out of the bidding process is ended. Reasonable men may differ as to the criteria which the municipal agency adopts in determining the responsibility of bidders, but it is the reason of the municipal agency, not the reason of the court, which prevails (*Matter of Caristo Constr. Corp. v. Rubin*, 15 AD2d 561, aff'd 10 NY2d 538; *Matter of Kayfield Constr. Corp. v. Morris*, 15 AD2d 373, 379). I see no grounds for the petitioner's claim that the board's action was irrational, because previous administrations of the board had not disqualified the petitioner from bidding and had awarded a contract to it. Surely, board policies are always subject to change, as conditions change; and no bidder can claim a vested interest in the bidding on the theory that new policies cannot bind a bidder who has previously performed a contract. To stultify the board by such a limitation thwarts the exercise of the function confided exclusively to it of properly providing for the transportation of the city's students. Nor do I see on this record a pattern of discrimination by the

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* One, a 50% stockholder, had been convicted in 1970 of the crime of falsifying information on a Federal Housing Administration loan application, and sentenced to six months in jail; he had also been charged in 1975 for driving while intoxicated, for which the disposition was a conditional discharge and $100 fine, which had been paid. The other stockholder, owning 25% of the stock, had been convicted in 1976 both of conspiracy, involving the obstruction of interstate commerce, and of income tax evasion; in 1970 he had also been convicted of possession of stolen property and fined $250.

board which prejudiced the petitioner. In the first instance, the character and extent of the criminal record of the petitioner's stockholders is a matter to be weighed by the board; what the criminal record of other bidders may be is equally a matter for the board. A court should not substitute its judgment of what is or is not significant in the background of the bidders which bears critically on their responsibility. Certainly, the background of the principals of the petitioner provided reason enough for the petitioner's disqualification. In any event, I cannot find any warrant in the provision of the judgment permitting the award of the contract to the petitioner on the condition that one of the two implicated stockholders shall sell his stock within six months and not participate in the affairs of the petitioner. That provision, it seems to me, clearly violates the rule that the court may not force the municipal agency by the manipulation of the bidder's stock ownership into accepting as the lowest responsible bidder one which has been found on rational grounds by the agency not to be responsible. For these reasons, I dissent and vote to dismiss the petition. [100 Misc. 2d 712].

APPENDIX "C"
SUMMARY

ABCO BUS CO., INC., Respondent, v. FRANK J. MACCHIAROLA, Individually and as Chancellor of the Board of Education of the City of New York, et al., Appellants.

Argued January 9, 1981; decided February 12, 1981

APPEAL from an order of the Appellate Division of the Supreme Court in the Second Judicial Department, entered May 12, 1980, which, by a divided court, affirmed a judgment of the Supreme Court at Special Term (JOSEPH SLAVIN, J.; opn. 100 Misc 2d 712), entered in Kings County in a proceeding pursuant to CPLR article 78, granting a petition to compel respondents to award petitioner corporation a transportation contract, on condition that one of petitioner's shareholders divest himself of his interest in the corporation. Petitioner corporation was the lowest bidder on a transportation of handicapped pupils contract for which the Board of Education of the City of New York had requested bids. The bid proposal provided that the award would be made to the lowest "responsible bidder," and following an investigation of the background of the three shareholders of petitioner corporation, the board determined that petitioner was not a responsible bidder, since two of the three individuals had criminal records. Petitioner then commenced this proceeding to compel the board to award it the contract, offering to have one of the shareholders of the corporation divest himself of ownership and alleging that the board's action was arbitrary and capricious. The majority at the Appellate Division determined that the board acted ar-

bitrarily and capriciously, since petitioner corporation had previously held the same transportation contract and had rendered satisfactory service, and that the board had awarded other contracts to other bidders even though their principals also had criminal records. The dissent concluded that in determining petitioner's responsibility, the board was entitled to take into account the criminal record of its principals; that the board, upon finding that two shareholders, who owned 75% of the corporate stock, had criminal records, could rationally determine that petitioner was not the lowest "responsible" bidder, and that once a rational basis was found for the board's decision, the court's power to interfere in the award of the contract was ended.

Abco Bus Co. v. Macchiarola, 75 AD2d 831, reversed.

APPENDIX "D"
DECISION OF COURT OF APPEALS

In the Matter of ABCO BUS CO., INC.,

Respondent,

v.

FRANK J. MACCHIAROLA, individually and as Chancellor of the Board of Education, of the City of New York, et al.,

Appellants.

Motion for reargument denied.

April 7, 1981

Office-Supreme Court, U.S.
FILED
JUL 13 1981
ALEXANDER L. STEVAS
CLERK

No. 80-1980

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

ABCO BUS CO., INC.,

Petitioner,

- against -

FRANK J. MACCHIAROLA, individually and as Chancellor of the Board of Education of the City of New York, and DAVID WOLOVICK, individually, and as Director of the Bureau of Supplies of the Board of Education of the City of New York, and FLORENCE FLAST, individually and as Director of Pupil Transportation of the Board of Education of the City of New York and THE BOARD OF EDUCATION OF THE CITY OF NEW YORK,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO A PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF NEW YORK STATE

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No. 80-1880

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

ABCO BUS CO., INC.,

Petitioner,

- against -

FRANK J. MACCHIAROLA, individually and as Chancellor of the Board of Education of the City of New York, and DAVID WOLOVICK, individually, and as Director of the Bureau of Supplies of the Board of Education of the City of New York, and FLORENCE FLAST, individually and as Director of Pupil Transportation of the Board of Education of the City of New York and THE BOARD OF EDUCATION OF THE CITY OF NEW YORK,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO A PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF NEW YORK STATE

QUESTIONS PRESENTED

1. Was petitioner entitled to advance notice of the standards to be applied by the Board

in ascertaining whether a bidder was "responsible" so that the failure to give such notice constituted a violation of petitioner's right to due process?

2. Does the record substantiate petitioner's claim that the Board's standards were unevenly applied without a rational basis so as to constitute a violation of petitioner's right to equal protection?

3. Did the New York Court of Appeals violate petitioner's rights under the Eighth Amendment to the United States Constitution?

STATEMENT OF THE CASE

Petitioner, formerly the holder of a contract to furnish transportation for handicapped children in the New York City school system which expired in 1979, submitted a bid for certain specific routes pursuant to a revised contract solicitation for the years 1979-1983 (A11-A13).*

After opening the bids for the various routes, the Board instructed the New York City Department of Investigation (hereinafter "D.O.I.") to investigate the principals and stockholders of the low bidders, of which petitioner was one, with a view towards determining whether the companies were the "lowest responsible bidders" in accordance with the contract and New York Education Law §305(14)(a) and General Municipal Law §103(1), that is, whether they possessed both financial and moral worth. It was the policy of the Board of Education not to

*Numbers preceded by an "A" are references to the Appendix; numbers followed by "a" are references to the appendix to the Petition unless otherwise noted.

award contracts to otherwise successful bidders if they did not meet the highest moral standards (A32). The Board had determined that such standards would not be met if the principals or stockholders of the companies in question had records of criminal convictions (A46; Transcript of Hearing held before Slavin, J. on August 13, 1979, pp. 37, 81-82, 90, hereinafter cited as "Hearing") .

As a result of D.O.I.'s inquiry, it was learned that two of the three stockholders of petitioner, Lawrence Paladino and Lorenzo Lampasi, had been convicted of crimes. Accordingly, petitioner was informed by letter dated June 29, 1979, that it would not be receiving the pupil transportation contract on which it was low bidder (A19). Petitioner thereafter requested an administrative appeal before respondents' Board of Review pursuant to Section 8.3 of the By-laws of the New York City Board of Education (A12-13). A hearing was held on

July 5, 1979 (A22-90), at which petitioner was represented by counsel.

At the hearing, Detective Poulos of D.O.I. testified that Lawrence Paladino had pled guilty in September 1976 in federal court to conspiracy to obstruct, delay, and affect commerce through extortion, in violation of United States Code, Title 18, §1951 (A38). The extortion involved the trucking industry. Paladino also pleaded guilty in 1976 to one count of income tax evasion (A38-39). In 1971, Paladino had also accepted a guilty plea to possession of stolen credit cards (A42).

Lorenzo Lampasi had been convicted in 1970 of falsifying government records, in that, in 1964, he had used funds obtained under an FHA loan for other than the intended purposes (A43, 97, Hearing, p. 60).

On these uncontroverted, documented facts, the Board of Review, in a memorandum to Chancellor Macchiarola, sustained the decision to disqualify

petitioner from being awarded a contract (A95-99). The Board of Review also found that the policy in question had been applied to all bidders uniformly (A98-99).

Following commencement of the instant Article 78 proceeding in New York Supreme Court, a hearing was held on August 13, 1979. Sheldon Rosenblum, Assistant Director of the Commercial Division of respondents' Office of Legal Services, testified that as a result of discussions with respondent Florence Flast, Director of the Bureau of Pupil Transportation, as to the meaning of the term "responsible bidder" (Hearing, p. 34), it was ultimately declared to be the policy of the Board of Education that "responsible bidder", as a term of art, would retain the same meaning previously ascribed to it by the cases, that is, financial and moral responsibility (A34-35, 37). One of the factors to be considered in determining whether the bidder was "responsible", however, was whether the

D.O.I. investigators discovered evidence of criminal convictions against any of the principals or stockholders of the low bidders.

On December 21, 1978, all prospective bidders were invited to attend a conference at which the proposed specifications were reviewed "page by page" (Hearing, p. 41). With respect to the term "responsible bidder", the prospective bidders were apprised that a thorough investigation as to the finances of the bidder would be made by the Board's Office of Auditor General, and that there would be a thorough background investigation made of the contractor, its principals and shareholders (Hearing, p. 42).

Following the bid openings in the latter part of February 1979, and the receipt of a D.O.I. investigation report in April, at a meeting in June 1979, the initial decision to disqualify a bidder, based upon the type and age of the conviction against a particular principal, was made (Hearing, pp. 50-52). Mr. Rosenblum testified that the D.O.I.

had uncovered discrediting information on the following bidders: ABCO Bus Co., Inc.; Able Bus, Inc.; Chief Transportation Corp.; Dash Transportation, Inc.; Omega Transportation Co., Inc.; Terry's Transportation; and Tufaro Transit Co. (Hearing, p. 55). None of the above, save ABCO and Omega, were disqualified because no sufficiently recent criminal convictions were found against the principals or stockholders of the companies to warrant disqualification. In Tufaro's case, a 23-year-old conviction for possession of a firearm, for which a $100 fine had been imposed, was considered too remote to be a ground for disqualification (Hearing, p. 58). The sole principal of Terry's Transportation had been charged with harassment, resisting arrest, operating a motor vehicle without a license, and leaving the scene of an accident; but, since it could not be ascertained to which count he had pled guilty, and in light of his sworn testimony before

the D.O.I. that it was to the motor vehicle charge, the Board decided to take no action to disqualify (Hearing, pp. 57-58). No convictions were found against the principal operator of Able Bus Co., although it was disclosed that in May 1977 he had asserted his Fifth Amendment rights at a D.O.I. interview (Hearing, pp. 73, 76). In the case of Chief Transportation Co., the Board of Review overturned the Board of Education's determination to disqualify based upon the absence of a conviction against its principal who had been dismissed from the Police Department, allegedly for accepting a bribe (Hearing, pp. 56-57). There was no derrogatory evidence found with respect to Dash Transportation (Hearing, p. 59).

Petitioner did not call any witnesses or submit any evidence.

Based upon its finding that petitioner had never been given advance notice of the standard to be applied by the Board in determining responsibil-

ity (2a-3a), and that the standards had not been applied uniformly (4a-5a), and that the Board had therefore acted arbitrarily and capriciously (5a), the New York Supreme Court (SLAVIN, J.) annulled the Board's determination to deny the contract to petitioner and, incorrectly treating the contracts as having actually been awarded and rescinded (A105), ordered the Board to honor its contract, provided Lawrence Paladino, the shareholder with the more serious conviction, divested himself of his shares within six months of the date of the court's decision (A5-6). 100 Misc. 2d 712, 420 NYS 2d 123 (Sup. Ct., Kings Co., 1979).

The Appellate Division of the New York Supreme Court affirmed the finding that respondents had acted arbitrarily and capriciously primarily based upon the failure of respondents to give petitioner advance notice of the standard of responsibility and because of the failure to disqualify other bidders whose principals had criminal records.

Justice Hopkins dissented, finding that a rational basis existed for respondents' determination and that the court was, therefore, powerless to interfere in the legitimate exercise of administrative discretion (11a-12a). 75 AD 2d 831, 427 NYS 2d 876 (2d Dept., 1980).*

The New York Court of Appeals unanimously reversed "for reasons stated in the dissenting memorandum by Mr. Justice James D. Hopkins at the Appellate Division". 52 NY 2d 938, 419 NE 2d 870 (1981), mot. for rearg. den.,___NY 2d___ (April 7, 1981).

*Due to errors in the reproduction of the Appellate Division opinions in petitioner's petition, the texts of those opinions are being reproduced in an appendix hereto.

REASONS FOR DENYING A WRIT OF CERTIORARI

NO FEDERAL QUESTIONS HAVE BEEN BEEN ARTICULATED WHICH REQUIRE REVIEW BY THIS COURT

(1)

The thrust of petitioner's petition for a writ of certiorari appears to be that it was denied due process when the standards by which the responsibility of the bidder was measured were changed by respondents without prior notice to petitioner. This issue was properly decided by the New York Court of Appeals in respondents' favor. Adopting the dissenting opinion of Justice Hopkins of the Appellate Division, Second Department, the Court of Appeals unanimously found that it was within respondents' administrative authority and discretion to determine the standards to be applied, to change such standards when it deemed it appropriate or necessary to do so, and to exercise reasonable discretion in measuring each bidder against those standards (10a-12a).

The breadth of administrative discretion in matters involving local contracts is clearly a question of state law. Although petitioner had formerly been awarded a contract by respondents, that contract was due to expire prior to the commencement of the new contract term. Petitioner did not possess any property rights with respect to the new contract and did not have a legally-cognizable interest superior to any other bidder. See Board of Regents v. Roth, 408 U.S. 564, 577-578 (1972). Petitioner's position was not, like the cases cited in its petition (p. 13), that of a licensee who has a vested right to perform particular services and to whom advance notice and a hearing is due prior to revocation of that right. See e.g., In re Carter, 177 F. 2d 75,78 (D.C. Cir., 1949), cert. den., 338 U.S. 900 (1949). Petitioner was not "entitled" as low bidder, to a binding contract (Petition at 12); rather, any expectation of award remained at all

times subject to its meeting the Board's criteria of "responsible", a factual matter consistently deferred to the discretion of the local government. See New Orleans v. Dukes, 427 U.S. 297, 303 (1976); Atkin v. Kansas, 191 U.S. 207, 222-223 (1903); Image Carrier Corp. v. Beame, 567 F. 2d 1197 (2d Cir., 1977), cert. den. sub nom Image Carrier Corp. v. Koch, 440 U.S. 979 (1979); American Yearbook Co. Inc. v. Askew, 339 F. Supp. 719, 722-723 (M.D. Fla., 1972, three-judge court), aff'd w/o opin., 409 U.S. 904 (1972). Thus, since there exists no right to do business with the government (Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 312-314 (1976); Perkins v. Lukens Steel Co., 310 U.S. 113 (1940)), and petitioner was accorded both administrative due process with respect to its disqualification pursuant to the standard established and state judicial review of the administrative action, it cannot be said that its rights have been violated

under federal law. See Perry v. Sindermann, 408 U.S. 593 (1972).

Gonzalez v. Freeman, 334 F. Supp. 570 (D.C. Cir., 1964), cited by petitioner (Petition at 16), is not to the contrary since there, the appellant had been barred from government employment without any opportunity to challenge the evidence; here, the evidence of conviction is clear and uncontested and petitioner has been accorded substantial due process.*

(2)

Petitioner also takes issue with the application by the Board of its standard of responsibility claiming that other bidders were awarded contracts despite evidence of criminal activity.

*It is noted that the propriety of the standard itself has not been challenged and, since the individual principals whose criminal records caused petitioner's disqualification were not parties to this litigation, the rights at issue are only those of the corporation.

The testimony indicates that only convictions were used as a basis for disqualification of bidders, not merely criminal records, i.e., arrests or indictments alone. Thus, petitioner's citations to Dash Transportation, which had not been awarded a contract, Able Bus Co., whose principal had previously taken his Fifth Amendment privilege in another context (Petition at 6-7, 11; Hearing, pp. 53-54), and Chief Transportation Inc., about which little is revealed except that no contract had as yet been awarded and the offending principal had not been criminally prosecuted (Petition at 11; Hearing, p. 53), are all irrelevant. Only Terry's Transportation Co. and Tufaro Transportation Co., of those cited, are even arguably in the same category as petitioner. These two were not disqualified based upon the second-stage evaluation, the age and seriousness of the crimes (Hearing, pp. 50-51).

The principal of Terry's Transportation had been charged with harassment, resisting arrest, operating a motor vehicle without a license, and leaving the scene of an accident, but had pleaded guilty only to the motor vehicle charge - a misdemeanor - and, therefore, Terry's was not disqualified. The principal of Tufaro Transit Company had a 23-year-old conviction for possession of a firearm for which be was fined $100. In considering the age and seriousness of the crime, it was decided not to disqualify that bidder.

> When local economic regulation is challenged solely as violating the Equal Protection Clause, this Court consistently defers to legislative determinations as to the desirability of particular statutory discriminations. See, e.g., Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356 (1973). Unless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, or alienage, our decisions presume the constitutionality of the statutory discriminations and require only that the classification challenged be rationally related to a legiti-

mate state interest. New Orleans v. Dukes, supra, 427 U.S. at 303.

There is not even a scintilla of evidence in the record at bar to suggest that petitioner's disqualification was motivated by other than the application of the standard of "responsibility" as defined by respondents. The fact that petitioner's principals' criminal convictions were found to be of such character and vintage as to require its disqualification in no way reflects a relationship to an inherently suspect distinction such as race, religion or alienage; nor are petitioner's First Amendment rights alleged to have been affected by the respondents' decision. Clearly, "the exclusionary line challenged...'is not directed "against" any individual or category of persons, but rather it represents a policy choice... made by that branch of government vested with the power to make such choices'." New York City Transit Authority v. Beazer, 440 U.S. 568, 592 (1979), quoting, Marshall v. United States, 414 U.S. 417,

428 (1974). Such circumstances do not present a constitutional question (440 U.S. at 593).

(3)

The Eighth Amendment to the United States Constitution is clearly inapplicable to the case at bar, particularly since the individuals whose criminal convictions caused petitioner's disqualification are not even parties to the suit.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

July 9, 1981

Respectfully submitted,

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Corporation Counsel
for the City of New York,
Attorney for Respondents.

LEONARD KOERNER,
CAROLYN E. DEMAREST,
of counsel.

DECISION OF THE APPELLATE DIVISION

In a proceeding pursuant to CPLR article 78 to compel the Board of Education of the City of New York (board) to award petitioner, Abco Bus Co., Inc. (Abco), a transportation contract, the appeal is from a judgment of the Supreme Court, Kings County (SLAVIN, J.), entered September 7, 1979, which awarded Abco the contract on condition that one of its shareholders, Lawrence Paladino, divest himself of his interest in the corporation.

Judgment affirmed, without costs or disbursements.

Abco was formed in 1971. It had a total of three shareholders: Lorenzo Lampazi, who owned 50% of its shares, and Lawrence Paladino and Jacqueline Greenberg, each of whom owned 25% of the shares. Since 1971 Abco had been satisfactorily transporting handicapped children for the Board of Education pursuant to a contract that had an expiration date in June, 1979.

Prior thereto the board invited bids for the transportation of handicapped pupils for the period of September, 1979, through June, 1982. Under sections entitled "Award," the proposals, inter alia, stated the following:

> "The award of Contract, if made, will be made according to law, as soon after the opening of bids as practicable, by item, to the lowest responsible bidder offering the lowest weighted average daily rate per vehicle for extended and regular service as specified in each item."
> (Emphasis supplied.)

Abco submitted a bid pursuant to the proposal which turned out to be a successful low bid on the routes in issue. The board then had the New York City Department of Investigation do a background check on the principals of Abco. On May 9, 1979 the Department of Investigation conducted a hearing as a result of which it was established that only Lampazi was involved in the day to day operations of Abco; that he had been convicted in 1970 of falsifying information on a 1964 application for a

Federal Housing Administration loan (he used the loan proceeds to pay doctor bills arising from his wife's pregnancy rather than for the stated purpose of modernizing his home); and that in 1975 he had been arrested and charged with the offense of driving while intoxicated which was disposed of by a conditional discharge and a $100 fine. As to Paladino, the Department of Investigation learned that in 1971 he pleaded guilty to a charge of possession of stolen property and was fined $250; that in 1976 he was convicted of income tax evasion and conspiracy involving the use of extortion to obstruct interstate commerce; and that in 1978 he violated his probation by associating with individuals having criminal records.

Subsequent to the completion of the investigation the board informed Abco, first orally and then by letter dated June 29, 1979, that it would not "be receiving an Award of Contract."

Abco sought and received administrative review of the denial. Moreover, Abso offered to have Paladino divest himself of his interest in the company if that would enable it to be awarded the contract.* Nevertheless, the board adhered to its position stating that principals of Abco have records of criminal convictions and that disqualification of bidders with such problems is being uniformly applied.

Thereupon, in August, 1979, Abco commenced this proceeding asserting that the board was acting arbitrarily and capriciously in refusing to award it a contract. A trial was held, the record of which shows that 1979 was the first year in which the board had instructed the Department of Investigation to investigate the backgrounds of

* We note that Abco has not cross-appealed from the judgment under review nor is Paladino a party to this proceeding. Therefore we have not addressed ourselves to whether Special Term erred in conditioning the award of the contract to Abco on Paladino's divesting himself of his interest in the firm.

successful bidders and that in June, 1979 the board established an internal policy that it would be reasonable to deem a corporate bidder "irresponsible" if any of its principals had a criminal record. More significantly, the evidence adduced showed that other bidders were awarded transportation contracts although their principals also had criminal records.

Based on the foregoing, we conclude that the board acted arbitrarily and capriciously in refusing to award a contract to Abco.

It is clear that a board of education has the authority and duty to award contracts for the transportation of school children to the lowest responsible bidder in accordance with the best interests of the school district involved (cf. Education Law, §305, subd 14, par a; General Municipal Law, §103, subd 1). We of course agree with the board that in determining whether a low bidder is responsible, moral character, including

prior criminal activities, depending on their nature, is a valid criterion (see Matter of Dellwood Foods v Board of Educ. of Hendrick Hudson School Dist., 97 Misc 2d 751; Matter of Limitone v Galgano, 21 Misc 2d 376). In Varsity Tr. v Saporita (71 AD2d 643, affd 48 NY2d 767) we recognized the wide authority vested in the board to make contract proposals that are required by the public interest. However, fundamental fairness requires that once such proposals are drawn and bid on, the board abide by its proposals and treat bidders uniformly.

The board, by its February 22, 1979 invitation for bids, required that the bidder be responsible. Abco, having satisfactorily served the board since 1971, had every right to assume that it was responsible and that its effort in making the bid would not be for naught. Nowhere did the board indicate that a bid would be rejected because a principal of the bidder had a criminal record. For

this reason we cannot countenance the application of the standard which the board seeks to impose on Abco. We are fortified in this view by the long satisfactory service Abco rendered the board, and by the fact that the crimes with which Abco's principals were charged are not of a type which make it clear that Abco is unable to responsibly or safely transport school children.

Finally, any doubt as to the arbitrariness of the board's action is obviated by its acceptance of bids from other corporations whose principals have records of criminal activities.

Accordingly, we affirm the judgment appealed from.

DAMIANI, TITONE and MARTUSCELLO, JJ., concur.

HOPKINS, J.P., dissents and votes to reverse the judgment and to dismiss the proceeding on the merits, with the following memorandum:

A municipal contract subject to the requirements of public bidding must be awarded to

the lowest responsible bidder (General Municipal Law, §103). In determining the lowest bidder, the municipal agency charged with the function is rightfully concerned with the bidder's responsibility -- an elastic word which includes considerations of skill, judgment and integrity. Hence, the background of the bidder may be properly investigated by the municipal agency (Matter of J.N. Futia Co. v Office of Gen. Servs. of State of N.Y., 39 AD2d 136).

Unquestionably, the Board of Education, in determining the petitioner's responsibility, was entitled to take into account the criminal record of its principals (see Matter of Zara Contr. Co. v Cohen, 23 AD2d 718; cf. State Finance Law, §139-b; General Municipal Law, §103-b). Hence the Board of Education, upon finding that two of the stockholders of petitioner, owning between them

75%* of the corporate stock, had criminal records, could rationally determine that the petitioner was not the lowest "responsible" bidder.

Once a rational basis for that determination is found to exist, the court's power to interfere in the award of a contract arising out of the bidding process is ended. Reasonable men may differ as to the criteria which the municipal agency adopts in determining the responsibility of bidders, but it is the reason of the municipal agency, not the reason of the court, which prevails (Matter of Caristo Constr. Corp. v Rubin, 15 AD2d 561, affd

* One, a 50% stockholder, had been convicted in 1970 of the crime of falsifying information on a Federal Housing Administration loan application, and sentenced to six months in jail; he had also been charged in 1975 for driving while intoxicated, for which the disposition was a conditional discharge and $100 fine, which had been paid. The other stockholder, owning 25% of the stock, had been convicted in 1976 both of conspiracy, involving the obstruction of interstate commerce, and of income tax evasion; in 1970 he had also been convicted of possession of stolen property and fined $250.

10 NY2d 538; Matter of Kayfield Constr. Corp. v Morris, 15 AD2d 373, 379).

I see no grounds for the petitioner's claim that the board's action was irrational, because previous administrations of the board had not disqualified the petitioner from bidding and had awarded a contract to it. Surely, board policies are always subject to change, as conditions change; and no bidder can claim a vested interest in the bidding on the theory that new policies cannot bind a bidder who has previously performed a contract. To stultify the board by such a limitation thwarts the exercise of the function confided exclusively to it of properly providing for the transportation of the city's students.

Nor do I see on this record a pattern of discrimination by the board which prejudiced the petitioner. In the first instance, the character and extent of the criminal record of the petitioner's stockholders is a matter to be weighed

by the board; what the criminal record of other bidders may be is equally a matter for the board. A court should not substitute its judgment of what is or is not significant in the background of the bidders which bears critically on their responsibility. Certainly, the background of the principals of the petitioner provided reason enough for the petitioner's disqualification.

In any event, I cannot find any warrant in the provision of the judgment permitting the award of the contract to the petitioner on the condition that one of the two implicated stockholders shall sell his stock within six months and not participate in the affairs of the petitioner. That provision, it seems to me, clearly violates the rule that the court may not force the municipal agency by the manipulation of the bidder's stock ownership into accepting as the lowest responsible bidder one which has been found on rational grounds by the agency not to be responsible.

For these reasons, I dissent and vote to dismiss the petition.

DECISION OF THE COURT OF APPEALS

Order reversed, with costs, and petition dismissed for reasons stated in the dissenting memorandum by Mr. Justic JAMES D. HOPKINS at the Appellate Division (75 AD2d 831, 833-834).